

**Letter of Findings: 06-0509
Withholding Tax
For the Tax Year 2005**

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ISSUES

I. Sales Tax –Sale of Pre-Packaged Items

Authority: [45 IAC 2.2-6-8](#); [Sales Tax Information Bulletin 29](#) (July, 2005)

The taxpayer protests the imposition of sales tax by the Department on pre-packaged bulk items including ice cream and cakes.

II. Tax Administration–Negligence Penalty

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#)

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer is a Limited Liability Corporation (LLC) organized in Indiana. The taxpayer is an ice cream shop that sells ice cream cakes, frozen yogurt, Italian sorbets, pies, premium ice cream and smoothies. The taxpayer offers to customers seating inside the shop. Taxpayer also sells pre-packaged bulk items.

I. Sales Tax – Sale of Pre-Packaged Items

DISCUSSION

Taxpayer believes that pre-packaged bulk items such as ice cream sold in pints, quarts, and buckets as well as ice cream cakes are not subject to sales tax. Taxpayer accepts the premise that items made at the store are subject to tax, but the taxpayer argues that pre-packaged bulk items delivered by the manufacturer and sold directly to the customer in the original packaging are not subject to sales tax.

[45 IAC 2.2-6-8](#) states:

(a) In determining the retail merchants' tax liability for a particular reporting period, the retail merchant shall multiply the retail merchant's total gross retail income from taxable transactions made during the reporting period except as otherwise provided in [IC 6-2.5-5-7](#) or in this chapter of Regulations [[45 IAC 2.2-6](#)], by the sales tax rate.

(b) The amount determined under this Regulation [[45 IAC 2.2](#)] is the retail merchant's state gross retail and use tax liability regardless of the amount of tax he actually collects.

[Sales Tax Information Bulletin 29](#) (July, 2005) provides in pertinent part:

All food items sold with eating utensils provided by the seller are taxable. Food shall be considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided. Taxable food therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises. Additionally, taxable food includes self-service food such as salad bars or drink islands. The presence of self-service utensils in a facility does not make otherwise exempt food taxable unless it is intended that the food be consumed with those utensils. Further, items provided solely pursuant to sanitary statutes or regulations and not for purposes of consumption do not qualify as utensils.

The pre-packaged bulk items such as ice cream that is sold in pints, quarts, and buckets as well as ice cream cakes are carry-out items that are traditionally not eaten at the taxpayer's location. Even though the taxpayer has seating, these pre-packaged bulk items are of a sufficient quantity that consuming them at the taxpayer's location is out of the question. Taxpayer has provided substantive evidence in support of its protest.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration–Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The taxpayer was sustained as to Issue I; therefore, the penalty is not applicable.

FINDING

Taxpayer's protest is sustained.

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